No. 88-704

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE: BENDECTIN LITIGATION

SARAH ANN HOFFMAN, *ET AL.*
ELIZABETH ANN DAVIS, *ET AL.*
and SHANE ROSS WOOD, ETC. *ET AL.*,
Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.,
Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

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PETITIONERS' REPLY

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INTRODUCTION

To illustrate the difference between the truth and what human beings perceive, Plato told the parable of the cave. In it, certain persons were consigned to live in a cave far from its opening with their legs and necks chained so that they could not move their heads and could not look in any direction but straight ahead at a wall. Behind and above them at a distance blazed a great fire, and between the fire and the prisoners was an elevated passageway on which there was much activity. But the people in chains could never see this activity directly; all they knew of it was what they could discern from the shadows of moving figures projected on the wall in front of them. "To them," reasoned Plato, "the truth would be literally nothing but the shadows of the images." *The Republic*, Chap. 7.

In our judicial system today, there is manifest danger that, as civil juries are increasingly shielded from certain sights, events, and facts that are naturally meaningful and evocative in the ordinary course of things, juries will be no more able to discern the truth in a trial than were the prisoners in Plato's cave. What is at stake is a jury system built on the assumption that truth flows from knowledge, and justice from truth. If juries are consigned to find truth not in that knowledge which is naturally most enlightening but instead among the shadows of images on a wall, what results is not justice at all, but rather, in Plato's words, "the images or shadows of images of justice." *Ibid.*

Two orders transformed the trial in this case into an abstract fact-finding exercise, sanitizing it way be-

yond all reasonable justification and, indeed, way beyond the dictates of fairness. These orders plainly fit into this trend of unduly keeping juries in the dark. Occurring in the same case, the orders present the Court with a rare opportunity to reaffirm the critical importance of the enlightened jury writ large and to resolve disputes among courts on whether juries can constitutionally be kept unenlightened when it comes to understanding specifically how the plaintiff claims to have been injured by the defendant's alleged conduct.[1]

By the trifurcaction order, the jury was forced to decide whether defendant's drug caused birth defects, without the benefit of any plaintiff-specific evidence on causation. The order vividly shows that the simple act of a carving up an issue like causation and trying it initially as a purely abstract question indeed substantially changes the rules of proving causation. By excluding certain plaintiff-specific evidence on causation even though it is admissible, and leaving only expert testimony devoid of references to what effect the drug had on these plaintiffs, the order deprived the jury of that chance to assess plaintiffs' theory of causation in its entirety.

By the plaintiff exclusion order the jury was shielded from visibly deformed plaintiffs. This protected defendants from the prospect that a juror, by

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[1] Conflicting decisions include the following: *Compare, Helminski v. Ayerst Laboratory, etc.*, 766 F.2d 208 (6th Cir. 1985); *Carlisle v. County of Nassau*, 64 App. Div. 2d 15, 408 N.Y.S. 2d 114 (1978); *Florida Greyhound Times, Inc. v. Jones*, 60 So.2d 396 (Fla. 1952); *with, Dickson v. Boler*, 269 Minn. 334, 130 N.W.2d 526 (1964); *Morley v. Superior Court*, 131 Ariz. 85, 638 P 2d 1331 (1981).

the mere sight of a deformed plaintiff, would broadly assume defendant's drug was the cause. But, ironically and quite significantly, the order did nothing to protect plaintiffs from the equally threatening prospect that a juror, seeing no deformed victims in the courtroom when seeing some would have been natural, would broadly assume defendant's drug does not cause deformities.

These orders operated in unison to ensure that the jury had only the most disengaged and refracted view of the matter before them.

I. THE COURT SHOULD GRANT CERTIORARI AND HOLD THAT TRIFUCATION ORDERS THAT PARSE UP THE CAUSATION ISSUE UNFAIRLY DEPRIVE A PLAINTIFF OF A FAIR TRAIL BY ELIMINATING HIS OPPORTUNITY TO SHOW WITH WHATEVER ADMISSIBLE EVIDENCE HE HAS THAT HIS THEORY OF CAUSATION IS PLAUSIBLE.

Under the guise of case management, trifucation transformed trial in this case into an abstract exercise premised on the assumption that causation could only be discussed and decided in a sterile atmosphere far removed from any specific consideration of how these plaintiffs were affected by defendants' drug. The Court should intervene to consider whether such orders have a place in a fair trial, whether such orders ever fairly narrow the jury's range of inquiry, and when such orders force the jury to find answers based on unnecessarily abstract and refracted evidence.

This Court has long recognized that an essential component of a fair trial is "a jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845, 849, 78 L.Ed. 2d 663 (1984).

Clearly, then, by extension of the Court's own definition, if a fair trial depends on whether the jury can resolve a matter based only on the evidence before it, there can be no fair trial unless the jury has before it *all* the evidence it needs to decide the matter.

Trifurcation operates to deprive the jury of the necessary context for judging causation. Discussing the defendant's conduct without reference to the harm which the plaintiff sustained deprives causation of its proper context. It is the context of the causation issue, the ability to project abstract information such as scientific data on a background of actual events and circumstances, which unlocks the door to complicated questions of causation. A causation issue that is never permitted to emerge from the realm of the abstract is destined to remain arcane and, thus, is all the more subject to guesswork resolution by a jury. Placing the issue of causation in context by means of plaintiff-specific information does not add to the complication of it; rather such information serves as an indispensable solvent, breaking down the issue into a form that a jury can best understand and, therefore, most easily and accurately resolve. In a fundamental sense, a plaintiff who has been denied the opportunity to show how he was harmed by the defendant's conduct has been deprived of an essential means for demonstrating the plausibility of his theory of causation. That opportunity was missing from this case and, to that extent, plaintiffs were denied a fair trial. Petitioners respectfully urge review of this issue on certiorari and reversal.

II. THE COURT SHOULD RECOGNIZE THE PRESUMPTIVE RIGHT OF A PLAINTIFF TO BE PRESENT AT HIS OWN TRIAL, AS A DERIVATIVE OF HIS RIGHT TO A FAIR TRIAL.

Defendant underscores precisely why the plaintiff exclusion issue is so ripe for resolution by this Court. Defendant sloughs off any presumptive right of plaintiffs to be present at their entire trial—even though *Helminski* appeared to recognize that right, at least until this case came along—and seems to suggest that any right plaintiffs might have had to be present at their own trial began and ended with serving "as witnesses or as human demonstrative evidence." Opposition to Petition, p. 19. These aspects of the plaintiff exclusion issue warrant this Court's attention in this precise context because, if a visibly deformed plaintiff is excludable based solely on his physical appearance, the Federal system will have adopted an unjustified presumption of excludability that operates to the plaintiff's unfair disadvantage and to the defendant's palpable advantage.

To suggest that there is no valid purpose for the physical presence at trial of a plaintiff who will not be called as a witness is to discount the importance of the visual aspect of a trial to the jury's fact-finding function. The jury's fact-finding function is at once associative and sensate, meaning that in a trial setting jurors apprehend the truth in part by associating what they hear with what they see. If jurors could hear witnesses but not see them, it would no doubt have a significant impact on their decisions. In weighing the evidence, jurors inevitably consider what each witness had to say and whatever else they were able to observe about the witness. So, too, the arguments of counsel and the instructions from the court have

visual as well as auditory impact because the attorneys and the judge, along with the witnesses, the parties, and the onlookers, constitute the trial setting, in both an audible and visual sense. While courts cautiously control the audible contributions from the various players at a trial (e.g., by prohibiting remarks from onlookers) there is less reason for eliminating any players from the vision of the jury altogether. Artificial manipulation of the trial's visual atmosphere carries the constant risk of unwittingly benefiting one side over the other, by removing from the jury's view someone who would naturally be present, without the appropriate explanations to the jury.

The plaintiff is no less crucial to the jury's visualization of the dispute than are the other players mentioned above. His presence at trial signifies that he is carrying the case to the defense. Yet defendant mocks the notion that a plaintiff's physical presence at trial serves any purpose beyond his testimony. We emphatically disagree. Defendant recoils at the thought that jurors will pay attention to a deformed plaintiff during trial, and that he or she will serve as a constant visual reminder to the jury of the harm defendant is alleged to have caused. Defendant is merely hiding from reality, for in a lawsuit the plaintiff personifies the dispute, giving it a human face. It is foolhardy to imagine that the system does not already contemplate that a jury will derive meaning from a plaintiff's physical appearance. Surely, defendant would not propose that we also exclude the victim of alleged sex discrimination whose physical appearance constantly reminds the jury that she is a woman; or the victim of alleged racial discrimination whose physical appearance constantly reminds the jury

that he is black; or the elderly victims of fraud whose physical appearance constantly reminds the jury that they are aged and vulnerable. Moreover, it is totally illogical to suggest there is something inherently unfair about a plaintiff being able to *advance* his cause by appearing in court. At the risk of stating the obvious, *that* is the reason why every plaintiff comes to court in the first place. So the prospect of excluding a plaintiff whose personal appearance could advance his cause—for example, by evoking sympathy—unfairly deprives that plaintiff of his right to present himself to the jury as the aggrieved party and unduly restricts the jury's ability to visualize the case as a human dispute.

On the other side, an order excluding the plaintiff can provide the defendant with a windfall, as it indeed did in this case. In a case such as this predicated on charges that defendant's drug caused plaintiffs' birth defects, the total absence from the courtroom of any plaintiffs with visible deformities serves as potent negative evidence in defendants' favor. It gives the jury reason to wonder why, if the drug has caused so many defects, every person who has presented himself at the trial appears to be perfectly normal. This false impression undercut plaintiffs' claim in this case, particularly since the district court did not stop with excluding visibly deformed plaintiffs. It also barred any evidence detailing plaintiffs' defects from being introduced to the jury in this phase. To extend the analogy of the sex-discrimination suit, this would be comparable to barring the female plaintiff from the courtroom *and* precluding all references that would give away her gender. The doubt thus created, like the unnecessary doubt fostered by the district

court through the trifurcation and plaintiff exclusion orders, is insidious and has no place in a fair trial.

The question whether or not a plaintiff exclusion order has a place in a fair trial also necessarily involves due process considerations. Yet the minimal safeguard of a hearing was lacking here, as was any hint of the criteria which persuaded the district court to exclude plaintiffs, beyond the obvious fact that they were visibly deformed. Not only is there a compelling need for this Court's enlightenment on the nature of the right of a plaintiff to be present at his entire trial, but if that be a presumptive right, the lower courts should have the benefit of the Court's guidance as to the precise criteria to weigh in resolving conflicts between a visibly deformed plaintiff's right to a fair trial and the defendant's right to a fair trial.

III. FEDERAL QUESTION JURISDICTION DOES NOT EXIST MERELY BECAUSE PETITIONERS ALLEGED IN THEIR COMPLAINTS A VIOLATION OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT

Respondent devotes the major portion of its argument supporting its proposition that alleging a violation of the Federal Food, Drug and Cosmetic Act (52 Stat. 1040, as amended, 21 U.S.C. Sec. 301 et seq., 1982 ed. Supp. II) within a cause of action for negligence instills within the trial court federal question jurisdiction. While respondent recognizes the fact that a right to private action under the Federal Food, Drug and Cosmetic Act does not exist, respondent argues that merely pleading a violation of the Act creates federal question jurisdiction. In so arguing, the respondent adopts the position most recently taken by the Court of Appeals for the Sixth Circuit in the instant case, which position contradicts the

Court of Appeals' earlier stance in the instant case as set forth in *Thompson v. Merrell Dow Pharmaceuticals, Inc.*, 766 F.2d 1005 (6th Cir. 1985), as well as this Court's holding in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).

It is the contradictory nature of the foregoing holdings which makes this issue one which is appropriate for the granting of certiorari. On one hand, the Court of Appeals for the Sixth Circuit has held, as has this Court, that pleading an alleged violation of the Federal Food, Drug and Cosmetic Act in a complaint filed in a state court, does not create federal question jurisdiction for purposes of removal. On the other hand, the Court of Appeals has held that pleading the same identical allegation in a complaint filed in federal court does create federal question jurisdiction.[2] These varying decisions cannot be reconciled.

In support of respondent's argument, respondent relies particularly upon two cases: *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 273 (1976) and *Fogel v. Chestnutt*, 668 F.2d 100 (2nd Cir. 1981) cert. denied sub. nom. *Currier v. Fogel*, 459 U.S. 828 (1981). However, respondent's reliance is misplaced. These cases do not address the issue before this Court.

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[2] The Court of Appeals dismissed without prejudice, thirteen actions brought by Ohio citizens in federal court, in which the respondent had conceded that no federal question jurisdiction was invoked. As to all other suits brought by Ohio citizens in federal court, in which the complaints filed were identical to those filed in the cases dismissed without prejudice and as to which respondent had not conceded an absence of federal question jurisdiction, the Court of Appeals held that the district court did have federal question jurisdiction.

In *Mt. Healthy City School District Board of Education v. Doyle*, supra, respondent had alleged causes of action under the First and Fourteenth Amendments to the Constitution, and asserted jurisdiction pursuant to 28 U.S.C. Sections 1343 and 1331. The Court assumed jurisdiction under 28 U.S.C. Section 1331. After certiorari had been granted, the petitioner raised the issue of whether respondent's only substantive constitutional claim arose under 42 U.S.C. Section 1983, and if so, whether petitioner was exempt from liability. Irrespective of the petitioner's issue regarding 42 U.S.C. Section 1983, jurisdiction was sufficiently established by the allegation of a claim (violation of respondent's right to free speech) under the Constitution. Further, even if 42 U.S.C. Section 1983 was a substantive basis for a claim by respondent, Section 1983 unquestionably provided respondent with a private right of action.

In *Fogel v. Chestnutt*, supra, a stockholder's derivative complaint was filed alleging a cause of action for breach of fiduciary duty to make full disclosure, wherein jurisdiction was alleged pursuant to the Investment Company Act of 1940, the Investment Advisors Act of 1940, and the Securities Exchange Act of 1934. The Court of Appeals for the Second Circuit had previously held, and the defendants had previously agreed, that the plaintiffs could in fact recover damages pursuant to the Investment Company Act of 1940. Other courts had also previously held that an implied right of private action existed under the Investment Advisers Act and the Investment Company Act. Upon the second appeal in the case, the defendants presented the argument that no private right of action for damages existed under the statute.

The Court of Appeals did not again determine the question, but instead, relied upon the principle of the law of the case, finding the argument presented by defendants was one which went to the merits as opposed to jurisdiction. In so holding, the Court of Appeals did discuss various cases which spoke to the issue of federal jurisdiction, but none of these cases clearly resolves the question which is presented by the instant case to this Court.

Thus, the two cases upon which Respondent relies provide no answer to the contradictory holdings of the Court of Appeals for the Sixth Circuit in the instant case. Both of the cited cases involved situations wherein a private right of action had already been recognized. Here, no private right of action exists, nor has one been previously recognized.

Respondent also argues that because a verdict has been rendered against the petitioners, federal question jurisdiction should be found to exist. However, the stage of the proceedings should have no bearing whatsoever upon a jurisdictional issue. Any action by a court without jurisdiction is a nullity and a party can attack jurisdiction at any time, even after judgment has been rendered. *Amer. Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951).

Respectfully submitted,

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